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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 198

JOSEPH PAGANO,

Petitioner,

—v.—

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1961

No. .....

Joseph Pagano,

Petitioner,

—v.—

Milton E. Sahn, as Trustee in Bankruptcy of Murray Packing Co. Inc., Bankrupt,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 25, 1962.

Citations to Opinions Below

The opinion of the Court of Appeals, printed in the Appendix hereto, is not yet officially reported. The opinion of the District Court for the Southern District of New York is reported in 200 F. Supp. 16 (R. 101a). There is also an opinion by the Referee in Bankruptcy herein (R. 84a).

Jurisdiction

The judgment of the Court of Appeals was made and entered on April 25, 1962 (R. 113a).

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

Questions Presented

The questions presented are:

1. Whether the judgment of the Court of Appeals directing the petitioner to turn over $745,000 to the respondent trustee in bankruptcy was properly made, notwithstanding the absence of evidence that the petitioner has the power to comply with this order, or that he has present possession of all or any part of this large sum.

2. Whether upon the hearing held on the petition for such turnover order the petitioner had the burden to show that he no longer had possession of any part of such $745,000, notwithstanding his claim of a constitutional privilege against self incrimination.

3. Whether the Referee exceeded his jurisdiction by deciding summarily that petitioner's adverse claim that he received such $745,000 from the corporation as a loan evidenced by his promissory notes was colorable, notwithstanding the evidence that all the directors, officers and stockholders of the corporation consented to and approved such loan.

Statutes Involved

11 U. S. C. §11. Courts; jurisdiction and powers.

"The courts of bankruptcy • • • are invested • • • with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings • • • to • • • (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; • • • make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; • • •."

11 U. S. C. §46. Jurisdiction of United States and State courts.

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants. • • •"

11 U. S. C. §110. Title to property.

"(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or

of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all * * * property transferred by him in fraud of his creditors * * *

"(e)(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision (e) is valid under applicable Federal or State laws."

Statement of Facts, Material to the Questions Presented

Murray Packing Co. Inc., was a meat and poultry wholesaler in New York City (108a). Petitioner became associated with it in March, 1960, as a salesman (108a). In December, 1960, he bought a third of its stock and became its president (108a). The directors were Gussie Weinberg, Terry Newman and himself (108a). Prior to his election, the corporation's purchases and sales averaged about

$100,000 weekly, but after his election the corporation's purchases and sales increased sharply, the new sales being mostly to customers that he brought (108a).

Between March 20, 1961 and March 29, 1961, while he was president of the corporation, petitioner borrowed $745,000 from it, and gave it his promissory notes to repay such sum in ninety days (18a-42a). He did not repay it (43a).

On April 4, 1961, the corporation made an assignment for the benefit of creditors (66a), and on April 11, 1961, an involuntary petition in bankruptcy was filed against it, and it was adjudged a bankrupt (1a).

On May 5, 1961, a petition was filed for an order directing this petitioner to turn over to the bankrupt estate the sum of $657,000, and directing Stanley Weinberg, Secretary-Treasurer of the corporation, to turn over $88,000, and the petition alleged that these sums were the property of the corporation and in the possession of this petitioner and Weinberg, respectively (1a).

Over petitioner's objection, the Referee decided, after a hearing, that he had summary jurisdiction (56a-59a); that petitioner received both sums from the corporation, and that Stanley Weinberg did not receive any part thereof (88a); that petitioner's claim that he borrowed this money from the corporation was colorable (88a); that his possession of the money within three months before the turnover decision, coupled with his refusal, on grounds of self incrimination, to testify what he did with the money, makes it a fair and reasonable inference that he is presently in possession or control thereof; and that such refusal to testify, on the ground of self incrimination, does not relieve him of his burden to come forward and explain what he did with the money (88a-89a).

Accordingly, on July 24, 1961, the Referee made an order directing the petitioner to turn over $745,000 to the trustee in bankruptcy, and denying the petition against Stanley Weinberg (99a).

On December 5, 1961, the District Court affirmed the said order in so far as it dismissed the petition against Stanley Weinberg, and reversed the said order, in so far as it granted the petition against the petitioner herein, and it dismissed the petition (101a).

On April 25, 1962, the Court of Appeals reversed the District Court's order, in so far as it dismissed the petition against the petitioner herein, and it affirmed the Referee's turnover order directed to the petitioner (106a). That Court approved the Referee's findings that petitioner's claim of a loan was colorable, and it said that petitioner's "claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them" (112a).

Reasons for Granting the Writ

I

The Referee found that the petitioner admitted receiving the sum of $745,000 from the corporation between March 20, 1961 and March 31, 1961 (92a, 94a), and that he "is in present possession or control" thereof (97a).

There was, however, no evidence whatever that the petitioner was in possession or control of any part of such $745,000 at any time after March 31, 1961. Instead, there was evidence that petitioner no longer had the money and could not repay it, such evidence being an account by Stan-

ley Weinberg, Secretary-Treasurer of the corporation, of a conversation with the petitioner, thus (62a-63a):

"After these checks were signed I had gotten together with my father and Joe Pagano had come up and asked for more money; he said he needed it and I asked him what he did with the first money, and he said that he had lost it; but he was getting it back if he had some more capital.

At the time I got a little frightened about it and I went down and called my father and Mickey but they were on a lower sales level.

I called them and told them I had gotten some money to give Joe some money and they asked me how much and I told them. They got very excited. I said 'that is not all; he wants more now.' So they called Joe in. He was on the street floor. My father at that time got very incensed about it. He said, 'what are you doing? You are taking whatever we have. We have to pay our bills.' And he tried to explain to Joe that we had a very good reputation. We have been in business a long time and always paid our bills, and he has to get the money back for us.

At that time Joe said, 'Look, all this business you got I brought you. That is what is making you a successful business. I need this money right now. I know I can get it back. You know my reputation and background, and my credit is always good with everybody. I just need it for a couple of days.'

At that time they talked it over and we said he has to have it right now; let him have what he needs and by the week-end he will have it back to us."

Weinberg further testified (44a):

"He told me he was in trouble. He had done something over the week-end, or the previous week; he had lost some money and he needed it."

The Referee based his decision that petitioner is in present possession or control of the bankrupt's money upon two factors, namely: (1) "Possession in Pagano has been established as late as March 31 of this year, less than three months ago. * * * This is 'inference from yesterday's possession' which is entirely permissible under the doctrine of *Maggio* v. *Zeitz*, 333 U. S. 56" (88a); and (2) "Pagano had the burden to come forward and explain what he did with the money * * * Refusal to answer on the ground it will incriminate him does not relieve him of the burden to explain" (89a).

Whether an inference should be made from recent possession of a bankrupt's property depends upon whether the property is readily disposable, such as the money loaned to petitioner in this case, and whether the person who received such property is a "fast living adventurer using the proceeds to make up the difference between income and outgo." *Maggio* v. *Zeitz*, 333 U. S. 56, 66.

In the latter case, "such acts, however reprehensible," do not "warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow." *Maggio* v. *Zeitz*, 333 U. S. 56, 64; *In re Rosser*, 101 Fed. 562, 566.

The turnover order in this case has precisely this effect. The Referee himself said, "Evidently these people can spend it overnight. I could not" (52a), thus recognizing that the petitioner no longer had the money, and could not comply with an order to turn it over to the trustee. Yet, the Referee found that the petitioner had possession or control of the money, not because there was evidence to that effect, but because he had obtained the money by what the Referee deemed an "unlawful raid on the funds of the bankrupt" (88a), and because of his "refusal to testify as to what he did with the money" (88a).

Even where "the property and its proceeds have already been dissipated" by conduct which "may be a crime", it would, nevertheless, "be a flagrant abuse of process" to issue a turnover order "to exert pressure on friends and relatives to ransom the accused party from being jailed." *Maggio v. Zeitz, supra,* 333 U. S. 56, 64; *Freed* v. *Central Trust Co. of Illinois,* 215 Fed. 873, 877.

In *Oriel* v. *Russell,* 278 U. S. 358, this Court said that while a turnover order is coercive and enforceable by contempt proceedings, it may not be used for purely punifive purposes, where there is no present ability to comply with the turnover order.

In the *Maggio* case, *supra,* this Court said that "to jail one for a contempt for omitting an act he is powerless to perform would . . . make the proceeding purely punitive." 333 U. S. 56, 72.

The turnover order is *res judicata* and precludes a subsequent claim by the debtor that he lacked ability to comply therewith at or before its issuance. *Oriel* v. *Russell, supra,* 278 U. S. 358, 365. In opposition to a motion to punish him for contempt for non-compliance with the turnover order, "the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." *Oriel* v. *Russell, supra,* 278 U. S. 358, 363.

On June 1, 1962, the attorneys for the trustee notified petitioner's attorney that they would make a motion to punish the petitioner for contempt for non-compliance with the turnover order.

Unless petitioner's ability to comply with the turnover order is decided in this proceeding on the basis of actual

evidence, instead of an inference founded on his possession thereof more than three months before the turnover order was made, and on his refusal, on grounds of self incrimination, to explain what he did with the money when he had it three months before, he will be limited, in the prospective contempt proceeding, to evidence of inability to comply caused by events that occurred subsequent to the issuance of the turnover order, which would, in effect, preclude him from showing that his inability to comply occurred before, rather than after the issuance of that order.

II

The Referee decided that the petitioner "had the burden to come forward and explain what he did with the money" (89a); that his "Refusal to answer on the ground it will incriminate him does not relieve him of the burden to explain" (89a); and that his "refusal to testify", together with his possession of the money "less than three months ago", makes it "a fair and reasonable inference" that the petitioner "is presently in possession or control thereof" (89a).

The Referee cited the *Maggio* case, *supra*, in support of this statement. But Maggio did not claim a privilege against self incrimination, and this Court's decision in that case did not consider or decide whether any inference of present possession of a bankrupt's property can be made from a claim of a privilege against self incrimination.

The Court of Appeals noted but did not decide "whether or not an inference could be drawn from his doing so in a proceeding of this sort", but it went on to decide that petitioner's "claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial

of continued possession of them", citing *Dittmar* v. *Michaelson*, 281 Fed. 116, 119, certiorari denied, 260 U. S. 738.

But such "denial of certiorari has no precedential significance." *In re Luma Camera Service*, 157 Fed. 2d 951, 954.

This Court has not decided in any case that a claim of a privilege against self incrimination does not relieve a witness of a burden to explain whether he still has property of the bankrupt, or what he has done with it, or whether he can comply with an order to turn it over to a trustee in bankruptcy.

This Court has held, however, that while a custodian of records of a corporation or association has no privilege against self incrimination that relieves him of a legal obligation to comply with a subpoena *duces tecum* that requires him to produce such records, he does have a constitutional privilege against self incrimination by his own oral testimony as to the location of records which he did not produce, and which he swore he did not presently have in his possession. This Court said that "forcing the custodian to testify orally as to the whereabouts of non-produced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Curcio* v. *United States*, 354 U. S. 118, 128.

Here, too, the inference of present possession or control of the money, founded on petitioner's claim of the privilege against self incrimination upon his refusal to answer questions as to what he did with the money when he had it, and the decision of the Court of Appeals herein that such claimed privilege is not "an adequate denial of continued possession" of such money, in effect, compels the petitioner to convict himself out of his own mouth, in view of the criminal charge of concealment of the bankrupt's

property that was made against him shortly after the bankruptcy. Petitioner thus faces the hard choice of using his privilege against self incrimination and being penalized therefor in this turnover proceeding and in the contempt proceeding to follow, by a decision that he had not made an adequate denial of continued possession of such money, when he refused, on grounds of self incrimination, to explain what he had done with it, or avoiding civil jail by giving the requisite explanation and thereby furnishing evidence that can be used to convict him of a charge of concealing property of the bankrupt corporation.

In *Morrison* v. *California*, 291 U. S. 82, 90-91, this Court said that there may be "a transfer of the burden" where "the evidence held to be inculpatory has at least a sinister significance", or where there is "in any event a manifest disparity in convenience of proof and opportunity for knowledge".

Here, petitioner's possession of the money three months before the turnover order was made, has no sinister significance that would support an inference that he still possesses it three months later. The shifting of the burden to the petitioner creates a manifest disparity in convenience of proof, by compelling him either to give up his privilege against self incrimination, or to have his present possession and control of the bankrupt's money, and his present ability to comply with an order to turn it over to the trustee in bankruptcy determined on the basis of an inference founded on his claim of such privilege.

In *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 557, this Court said that it "must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", and that "no inference of guilt was possible from the claim" of a privilege against self incrimination in that case.

Here, the Referee and the Court of Appeals have inferred, in effect, that the petitioner is retaining present possession of the bankrupt's money, from his claim of the privilege against self incrimination in refusing to answer questions as to his disposition of such money.

III

The Referee exceeded his jurisdiction in his decision that petitioner's claim that he borrowed the money from the bankrupt corporation was colorable. Petitioner's claim was supported by documentary evidence consisting of the promissory notes that he signed, and the entries in the books of the corporation, made by its Secretary-Treasurer and by its bookkeeper (18a-44a). It was also supported by the oral testimony of the petitioner and of the said Secretary-Treasurer, who testified in some detail, that his father, Joseph Weinberg, and Mickey Newman, who, through their wives as nominees, owned two thirds of the shares of the corporation, while the petitioner owned the remaining shares, expressly authorized him to approve the checks drawn on the corporation's bank accounts to petitioner's order as loans for which petitioner gave his promissory notes (62a-71a). This documentary evidence and oral testimony was not contradicted by any documentary evidence or oral testimony. Nevertheless, the Referee rejected all such evidence as incredible, and decided that the loans were colorable.

In thus rejecting petitioner's claim, solely on the basis of credibility, the Referee exceeded his jurisdiction, which was limited to "the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial." *Cline* v. *Kaplan*, 323 U. S. 97, 99.

Where the property is in the actual or constructive possession of the bankruptcy court, it may summarily adjudi-

cate rights and claim thereto. *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 481.

Here, however, the money is not in the actual or constructive possession of the bankruptcy court. Petitioner obtained possession thereof by checks drawn on the corporate accounts, with the consent of all the officers, directors and stockholders of the corporation.

The trustee's contention that such withdrawal of money from the corporation was fraudulent as to its creditors does not restore to the corporation title to the money in advance of adjudication of fraud in a plenary suit therefor, because in a turnover proceeding "an actual claim may be adverse and substantial even though in fact fraudulent and voidable.'" *Harrison* v. *Chamberlin*, 271 U. S. 191, 194.

The fact that the petitioner was an officer of the bankrupt corporation does not give the bankruptcy court jurisdiction to determine summarily the merits of his adverse claim. *Slenderella Systems* v. *Pacific T. & T. Co.*, 286 Fed. 2d 488, 490; *Ford* v. *Magee*, 160 Fed. 2d 457; *In re Wire Corporation*, 131 F. Supp. 586.

We have not found any other reported case in which a claim that money was borrowed from a bankrupt with his consent, was summarily rejected by a bankruptcy court in a turnover proceeding, at the request of a trustee in bankruptcy, upon his claim that the transaction defrauded the bankrupt or his creditors.

Where a person is holding money or property as agent or fiduciary for the bankrupt, he will be directed summarily to turn it over to the trustee in bankruptcy, because he can only show that his possession thereof was on behalf of the bankrupt, and he cannot show any transaction with the bankrupt whereby he obtained a right to such property, as against the bankrupt. *May* v. *Henderson*, 268 U. S. 111.

But where an agent or fiduciary can show an actual transaction with the bankrupt on which he bases his own claim to some part of the bankrupt's money or property, the bankruptcy court will not, over his protest, summarily decide the merits of his claim in a turnover proceeding. *Galbraith* v. *Vallely*, 256 U. S. 46, 50. Thus, this Court held in the *Galbraith* case, *supra*, that although an assignee for the benefit of creditors was required by law to turn over to the trustee in bankruptcy all of the bankrupt's assets that came into his possession by means of the assignment, he could, nevertheless, retain the money that he claimed to be due him for his own disbursements and compensation as such assignee. This Court said that such an assignee "could not be proceeded against summarily for such disbursements and compensation over his protest duly made against that method of procedure." 256 U. S. 46, 50.

IV

The questions presented and discussed above are important in the administration of the bankruptcy laws, and they recur frequently. A turnover order, such as was made in this case, may be made in other bankruptcy cases upon the same kind of inference of present possession of the bankrupt's property and present ability to comply with an order that it be turned over to the trustee, based on refusal of a witness to explain what he did with such property and his claim of a privilege against self incrimination as the reason for such refusal; and there may be other cases in which corporate officers may be directed to turn over to a trustee in bankruptcy property or money of a bankrupt corporation which they received from it in a transaction to which all its directors and stockholders consented.

The decision of the Court below is believed to be erroneous, because it subjects the petitioner to civil imprison-

ment for non-compliance with an order with which he cannot comply, it bases its determination upon an inference that he has present possession of the bankrupt's property and that he has present ability to comply with an order to turn it over to the trustee in bankruptcy, it draws such inference from the fact of petitioner's claim of a constitutional privilege against self incrimination in refusing to explain what he did with such money when he had it, and it compels him either to have such inference drawn against him from his claim of such privilege, or to give up such constitutional right and make the requisite explanation though it may incriminate him. Finally, the decision herein exceeds the jurisdiction of the bankruptcy court by summarily disregarding the documentary and oral testimony that title to the money actually passed from the corporation to the petitioner as a loan evidenced by promissory notes, to which all the corporation's directors and stockholders consented, and summarily directing the petitioner to turn over such money to the trustee in bankruptcy, upon a finding that the transaction was fraudulent and colorable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT J. VELELLA
Counsel for Petitioner

MORRIS WEISSBERG
Of Counsel

Judgment

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of April one thousand nine hundred and sixty-two.

Present:

HON. CHARLES E. CLARK,
HON. CARROLL C. HINCKS,
HON. HENRY J. FRIENDLY,
Circuit Judges.

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Petitioner-Appellant,

—against—

JOSEPH PAGANO,

Respondent-Appellee,

and

STANLEY WEINBERG,

Respondent.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the order of the Referee be and it hereby is affirmed in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO
Clerk

Opinion in Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 292—September Term, 1961.

(Argued April 2, 1962 Decided April 25, 1962.)

Docket No. 27380

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Petitioner-Appellant,

—v.—

JOSEPH PAGANO,

Respondent-Appellee,

and

STANLEY WEINBERG,

Respondent.

Before:

CLARK, HINCKS and FRIENDLY,

Circuit Judges.

Appeal by trustee in bankruptcy from an order of the District Court for the Southern District of New York, John F. X. McGohey, *Judge*, 200 F. Supp. 16 (1961), reversing an order of a referee which had directed appellee to turn over monies received from the bankrupt. Reversed.

HAROLD L. LIPTON (Booth, Lipton & Lipton) (Edgar H. Booth of Counsel), New York, New York, *for Petitioner-Appellant.*

SAMUEL D. PRESSMAN (Vincent Velella, Saul I. Radin, of Counsel), New York, New York, *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

Milton E. Sahn, trustee in bankruptcy of Murray Packing Co., Inc. (hereafter Murray or the bankrupt), appeals from an order of the District Court for the Southern District of New York, 200 F. Supp. 16 (1961), which reversed an order of Referee Herzog directing Joseph Pagano, president of Murray, to turn over to the trustee $745,000 admittedly received by Pagano from Murray within the month preceding the filing of the involuntary bankruptcy petition. This order was without prejudice to the plenary suit which the judge believed to be required. We reverse the order of the District Court and restore that of the Referee.

The summary turnover order is "a judicial innovation by which the court [of bankruptcy] seeks efficiently and expeditiously to accomplish ends prescribed by the statute." *Maggio* v. *Zeitz*, 333 U. S. 56, 61 (1948). The rules governing this remedy were authoritatively stated in Mr. Justice Sanford's opinion in *Harrison* v. *Chamberlin*, 271 U. S. 191 (1926): "* * * a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant * * * However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a pre-

liminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily * * *" An adverse claim is merely colorable if and only if "the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

Mr. Justice Sanford's statement suffices to show that a clearly baseless claim of fact no more gives the needed color than an equally baseless claim of law. *In re Meiselman*, 105 F. 2d 995, 998 (2 Cir. 1939), underlined that a mere assertion of fact is not enough; we said, referring to *Harrison* v. *Chamberlin*, *supra*, *May* v. *Henderson*, 268 U. S. 111 (1925), and other cases, "We do not interpret these decisions as requiring the holding that there is reasonable doubt from the claimant's own testimony alone, when it is disbelieved by the referee * * * A claimant cannot avoid a summary order by the very audacity of his claims of either fact or law. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest and a due consideration of existing law."

That is what the referee did here. He characterized the story unfolded before him on the petition for a turnover order, primarily in testimony of Stanley Weinberg, Secretary-Treasurer of the bankrupt, as "the most audacious raid on a treasury that I have ever encountered." In summary it was this:

Murray was a meat and poultry wholesaler in the Bronx. Pagano became associated with Murray in March, 1960, as a salesman. In December, 1960, he bought a third of its stock and became its president; the directors were Gussie Weinberg, Terry Newman, and himself. Until Pagano took-

over, Murray's purchases had averaged around $100,000 per week, and it was meeting its bills in a normal fashion. After Pagano's election as president, purchases and sales started a speedy upward course, the new sales being primarily to customers brought in by Pagano.

Between March 20 and March 29, 1961, Stanley Weinberg, on Pagano's instructions, drew various checks to Pagano's order which ultimately totalled $745,000. The first two, $50,000 each, were drawn on March 20 on the Royal State Bank of New York. When Weinberg came over to cash the checks, the bank, not having that amount in cash, drew its own check for $12,000 to Pagano and two checks, for $38,000 and $50,000, to the order of The First National City Bank which that bank cashed; Pagano's counsel conceded that Pagano received the $100,000 represented by the three checks. The Royal State Bank having advised that it would not honor checks drawn against uncollected funds, Pagano directed the opening of a new account at the Commercial Bank of North America where one of his customers kept its own balance, so that the bankrupt could draw immediately on deposits of the customer's checks; the Commercial Bank of North America was given a certified copy of an authorizing resolution purportedly adopted at a directors' meeting, which, Weinberg testified, had never occurred. The remaining $645,000 was drawn in 14 checks on the new account; Pagano admitted the receipt of this money. On each of three days three separate checks were cashed; not knowing exactly what drawable funds were in the account, Weinberg gave Pagano several checks so that he could get whatever was available. Meanwhile more than $400,000 in checks drawn to trade creditors remained unissued.

At the outset Weinberg acted simply on Pagano's demand, without discussion with anyone. Quite early in the game, however, he called his father, Joseph Weinberg, and

Micky Newman, husbands of the two ladies who were listed as stockholders and directors along with Pagano. Joseph and Micky "got very excited" but ended up telling Stanley to let Pagano "have what he needs and by the week-end he will have it back to us."[1] Stanley Weinberg "knew whatever he [Pagano] wanted I had to give it to him"—a knowledge which Pagano reinforced by "banging on the desk" and admonishing "'look, I am the boss. You just do what I tell you, and that's all there is to it.'"

Allegedly Pagano executed ninety-day notes for the amounts received, although circumstances created legitimate doubt whether the notes were in fact delivered prior to the bankruptcy. By April 4, 1961, when Murray executed an assignment for the benefit of creditors, accounts payable exceeded $1,300,000 and cash in the two banks was down to $3,000. Weinberg knew of no legitimate business purpose for the payments to Pagano and made no investigation of Pagano's ability to repay; Pagano told Weinberg "he was in trouble. He had done something over the week-end, or the previous week; he had lost some money and he needed it." When asked, at the hearing held on June 9, 1961, what he had done with the $745,000 concededly received from the bankrupt, Pagano refused to answer, as he had with respect to these and other questions when examined under §21-a on May 15, 1961, on the ground that an answer might tend to incriminate him.

On this record the Referee held that the claim of a loan was "frivolous, baseless and fictitious and is put forward in bad faith" and that, in the absence of any evidence that Pagano no longer had the money, the "inference from yesterday's possession," recognized in *Maggio* v. *Zeitz*, *supra*, 333 U. S. at 66, warranted a finding that Pagano still held the bankrupt's property. Accordingly, he directed

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1 Neither Joseph Weinberg nor Newman was called as a witness.

Pagano to turn over $745,000 within five days from service of an order, which he signed July 24, 1961.

The District Judge reversed, stating, 200 F. Supp. at 18, that "It is not for him [the referee], in a turn-over proceeding, to decide the merits of really controverted issues," with which we agree, and that "Pagano's defense, however improbable it may seem, is no more frivolous than that of the plaintiff [sic] in Ford v. Magee," 160 F. 2d 457 (2 Cir.), cert. denied, 332 U. S. 457 (1947), with which we do not. Very likely the general strictures against resort to turnover proceedings in the concluding portion of that opinion,[2] 160 F. 2d at 460, misled the judge into thinking the case decided more than it had. There the defendant, Magee, admittedly had a *bona fide* claim against the bankrupt; the issues were whether the general manager of the bankrupt had consented that Magee keep a certain check in payment of that claim and had authority to do so. Since there was nothing inherently improbable in Magee's testimony of consent by the general manager, whom neither side called, and much evidence that the directors had delegated wide authority to him, this Court concluded that Magee's claim could not be said to lack the needed color. However, another sentence in the opinion made it plain that mere assertions do not prevent a finding of lack of color; it said that Magee's denials that he knew the check was intended for the corporation "were patent, even childish, concoctions which the referee was right to disregard; and if the result depended only upon his finding that Magee knew that he was appropriating corporate funds, we should unhesitatingly affirm," 160 F. 2d at 459.

Here the result did depend only on the referee's finding that Pagano "knew that he was misappropriating corporate funds," and the referee was warranted in regarding

2 These are severely criticized, on very substantial grounds, in 2 Collier, Bankruptcy (Moore and Oglebay ed. 1961), ¶23.06, at pp. 484-485 fn.

the loan explanation as "patent, even childish, concoctions." Weinberg's uncontradicted testimony fairly shrieked of theft; it would be supererogation to dot the i's and cross the t's. Pagano offered nothing in opposition save the notes, whose term was itself inconsistent with Weinberg's testimony as to short-term accommodation and whose contemporaneous delivery was dubious. If proof of such delivery would have given the needed color, the judge would have been right in insisting on a full-scale proceeding; but it would not. A theft is no less a theft if the thief obligingly leaves a note in the cash drawer; like a higher tribunal, a referee may also recognize that "there comes a point where this Court should not be ignorant as judges of what we know as men," Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U. S. 49, 52 (1949). Pagano was free to avail himself of the privilege against self-incrimination but—whether or not an inference could be drawn from his doing so in a proceeding of this sort, see 8 Wigmore, Evidence (McNaughton rev. 1961), §2272, at p. 439 & fn. 14—his claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them. *Dittmar v. Michelson*, 281 F. 116, 117 (3 Cir.), cert. denied, 260 U. S. 738 (1922). Pagano's story was quite as pallid as that held to lack sufficient "color" in *In re Weinreb*, 146 F. 243 (2 Cir.), cert. denied, 203 U. S. 588 (1906); it fits Judge Augustus N. Hand's phrase, "standardized forms of falsehood so often reiterated as to be neither credible nor interesting," *In re Abesbaum*, 70 F. 2d 628 (2 Cir. 1934). Accepting that "The Referee and the Court in passing on the issue under * * * a turnover motion should * * * require clear evidence of the justice of such an order before it is made," *Oriel v. Russell*, 278 U. S. 358, 363 (1929), we think this test was met.

The order of the District Court is reversed and that of the Referee is affirmed.

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Supreme Court of the United States

October Term, 1961

No. [redacted] 198

JOSEPH PAGANO,

Petitioner,

against

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1961

No. 1058

JOSEPH PAGANO,

Petitioner,

against

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

The questions presented are:

1. Whether the Referee in Bankruptcy below had summary jurisdiction to hear and determine the motion for a turnover order against the petitioner and to grant the turnover order in question.

2. Whether the order directing the petitioner to turn over to respondent the sum of $745,000 was properly granted upon the facts at issue.

3. Whether any inferences drawn by the trier of fact from petitioner's failure to rebut evidence adverse to him by a claim to constitutional privilege against self-incrimination were proper under the facts and circumstances of the proceedings below.

Summary of the Argument

The discretionary jurisdiction of this Court, on a petition for writ of certiorari should not be exercised in this cause because the decision of the court below does not conflict with the decisions of other courts of appeals or of this Court and no important question of federal law is presented, which has not been, but should be, settled by this Court.

The determination of the court below, that the Referee had summary jurisdiction to grant the turnover motion, was in conformity with the decisions of this Court.

The determination of the court below, that the Referee properly granted the turnover motion, also was in conformity with the decisions of this Court and does not present a novel or important question that has not been, and should be, settled by this Court.

Any inferences that were drawn from petitioner's failure to testify as to facts within his control in this civil cause, by reason of his claim of the Constitutional privilege, were proper and in conformity with the decisions of this Court.

Statement of Facts Material to the Questions Presented

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that court, made and entered on April 25, 1962, reversing an order of the District Court for the Southern District of New York, which, in turn, reversed an order of the Referee in Bankruptcy below which directed the petitioner, Joseph Pagano, to turn over the sum of $745,000, representing monies taken by him fro[illegible] the bank account of Murray Packing Co. Inc. by the [illegible]ishing of checks over a period of ten days in March 1961, which the

Referee found Pagano was holding without any claim or color of title.

The brief summary of the facts at issue in the petition for the writ sought herein does not present the case in its full flavor. Murray Packing Co. Inc., the bankrupt herein, a New York corporation, was engaged in the business of wholesale sale of meats and poultries (app., p. 90a).*

Joseph Pagano, the petitioner, first became associated with an affiliated company of the bankrupt in March of 1960 as a salesman (38a, 39a). In January, 1961 he purported to purchase one-third of the outstanding capital stock of the bankrupt, and became its President (16a). At the time, Stanley Weinberg was Secretary-Treasurer of the bankrupt and continued to hold this office. Prior to January, 1961, the bankrupt's purchases of merchandise from suppliers had averaged approximately $100,000 per week. Thereafter, under Pagano's direction, the bankrupt's purchases of merchandise increased so astronomically that its liabilities were almost $1,300,000 on or about April 11, 1961, the date when the involuntary petition in bankruptcy was filed (55a). Most of the increased amount of merchandise purchased by the bankrupt was sold by it to corporations or firms that Pagano brought in as customers (56a, 66a).

The bankrupt had maintained its corporate bank account at the Royal State Bank of New York. On March 22, 1961, another corporate bank account was opened at the Commercial Bank of North America by Messrs. Pagano and Weinberg (62a). This was the same bank and the same branch where the major customer brought in by Pagano maintained its bank account (57a, 65a). The only purpose for opening the new account at the Commercial

* All references are to pages in Respondent's Appendix below, unless otherwise indicated.

Bank of North America was to permit credit to be established so that the bankrupt could draw almost instantaneously against payments received in the form of checks, most of which were certified, from the particular customer to whom substantially all the additional merchandise was being sold (57a, 65a). The new account was opened because Royal State Bank, after one episode of check cashing, refused to permit them to draw against uncollected funds, even in the form of certified checks, or to cash checks drawn against such deposits.

The acts complained of, the bold conscienceless looting of a corporate treasury which became the subject matter of the turnover proceedings, took place between March 20, 1961 and March 29, 1961 (93a). During that period of ten days a total of $745,000 was withdrawn from the two corporate bank accounts by corporate checks issued to the order of Joseph Pagano, signed by Pagano and Weinberg on behalf of the bankrupt and cashed at the bank (7a, 9a). These withdrawals were as follows:

Date of Checks	Bank Account	Amount of Checks	Total
3/20/1961	Royal State Bank of N. Y.	$50,000	
		$50,000	$100,000
3/22/1961	Commercial Bank of North America	35,000	35,000
3/23/1961	Commercial Bank of North America	50,000	50,000
3/24/1961	Commercial Bank of North America	25,000	
		50,000	
		50,000	125,000

Date of Checks	Bank Account	Amount of Checks	Total
3/27/1961	Commercial Bank of North America	50,000	
		50,000	
		75,000	
		75,000	
			250,000
3/28/1961	Commercial Bank of North America	25,000	
		25,000	
		50,000	
		50,000	150,000
3/29/1961	Commercial Bank of North America	35,000	35,000
	Total Amount Withdrawn		$745,000

Substantially all of the monies so taken by Pagano were derived from the payments to the bankrupt made by the customers he brought in for merchandise ostensibly purchased from the bankrupt (57a). All checks issued to Pagano were signed by Weinberg at the request of Pagano (7a, 66a). On March 24, March 27 and March 28, 1961, instead of one large check, several "smaller" checks, none less than $25,000.00, aggregating the larger sum were prepared by Weinberg to Pagano's order in order to permit Pagano to withdraw every single dollar in collected funds standing to the credit of the bankrupt in its account at Commercial Bank of North America (41a, 69a, 70a).

Pagano appeared in the turnover proceeding and admitted receiving the sum of $745,000 from the bankrupt's funds during the ten-day period in question (6a, 7a, 8a), which he claimed were "loans" to him by the bankrupt (14a). He even introduced into evidence a series of promissory notes allegedly given by him at the time of the making of the various withdrawals which he characterized as

"loans" (21a, 24a, 29a, 30a, 33a; 34a). However, on cross-examination he refused to answer questions as to what he did with these monies or whether he still had them, claiming his privilege against self-incrimination, which was sustained (73a, 75a, 84a).

Prior to the turnover proceeding, Pagano was examined by the Receiver as a witness under Section 21a of the Bankruptcy Act, and the transcript of this examination was received in evidence in the turnover proceeding (51a). There he claimed his constitutional privilege against self-incrimination and refused to answer any material questions as to whether he received the monies, whether he had disbursed any of the monies, or whether he had any part of the monies in his possession (75a-84a). Altogether, he refused to answer thirty-two (32) questions put to him by the Receiver's attorney, based upon a claim of privilege against self-incrimination, which was sustained by the Referee.

The promissory notes claimed to have been made by Pagano to evidence the "loans" he was making from the bankrupt were found among the bankrupt's books of account, records and papers which were mysteriously delivered by persons unknown to the office of Weinberg's attorney on the eve of the trial of the turnover proceeding (7a, 19a, 22a, 23a). The bankrupt's books and records also were the subject matter of a separate turn-over proceeding commenced by the Receiver, after the books could not be found and the bankrupt's officers reported the books and records had "disappeared". The latter motion was withdrawn after various of the books of account and records and papers were delivered to the attorneys for the Receiver in open court (32a, 33a).

The promissory notes executed by Pagano were conveniently protruding from the pages of the bankrupt's cash disbursements book in which entries had been made describing the monies taken by Pagano as "loans and ex-

changes" (23a). Several pages of the cash disbursements book bearing the entries of these so-called "loans and exchanges" had been re-written by the bookkeeper after the date of original entry, at Weinberg's instructions, to change the original entries (26a-28a).

Weinberg testified that he had prepared the notes himself (19a) and that he had expected repayment from Pagano of the monies so taken in a "few days" or "after the weekend" (64a, 65a), but all of the notes which were put into evidence were payable three months after date (21a, 24a, 29a, 30a, 33a, 34a). Weinberg, who had charge of the granting of credit by the bankrupt and supervised its office, admitted that he made no inquiry as to Pagano's financial condition or ability to repay these "loans" during the period the monies were being withdrawn (41a, 42a). No security was sought or obtained. Weinberg just signed checks totaling $745,000.00 and permitted Pagano to drain the corporate treasury.

There were such glaring errors in these so-called promissory notes as to indicate their lack of genuineness. Thus, one of the notes did not even contain the name of a payee (45a); another note was made in the amount of $275,000. although the monies concededly withdrawn on that date and for which this note was made amounted to $250,000 (31a, 32a).

The first note, covering the $100,000 withdrawal from the bankrupt's account at Royal State Bank, was dated March 20, 1961, but was made payable at Commercial Bank of North America—where neither Pagano nor the bankrupt then had an account (21a). The bankrupt's account at Commercial Bank of North America was not opened until March 22, 1961. This fact alone demonstrated what became increasingly evident at the hearing, that all of the notes were prepared at the same time and after the events complained of, for the purpose of interposing a defense to the turnover motion.

Among the books and records delivered to the office of Weinberg's attorney was a file of bills payable for the month of March, 1961 to which were attached checks of the bankrupt, both signed and unsigned, in various amounts aggregating in execess of $400,000 (48a, 49a). The withdrawals by Pagano of the funds of the bankrupt, aggregating $745,000., during his ten-day "fling" in the month of March, 1961, rendered the bankrupt wholly unable to pay its due bills (96a). These withdrawals also rendered the bankrupt totally and hopelessly insolvent, both in the bankruptcy and equity definition of that term (96a, 97a).

Upon these facts, the Referee found that this $745,000 in cash was not received by Pagano pursuant to genuine and bona fide loans from the bankrupt and that his title to the monies was entirely without color of right. In so finding, the Referee found that the alleged "loan" nature of these withdrawals was wholly and completely incredible and rejected this fabrication in its entirety. He further rejected Weinberg's testimony that these monies were loaned to Pagano by the bankrupt and that Weinberg had excepted repayment thereof to the bankrupt in "a few days" or "over the weekend". The Referee then found that Pagano was in present possession or control of these monies aggregating $745,000 taken by him from the bankrupt, and that the Trustee was entitled to the immediate possession thereof as property of this estate (84a-89a).

The District Court on review determined that the Referee did not have summary jurisdiction to determine the Trustee's claim against Pagano, in effect giving full credence to the contention of Messrs. Pagano and Weinberg that the withdrawals by Pagano were loans (105a).

The District Court reversed the Referee's order without prejudice to a plenary suit by the trustee. An appeal to the United States Court of Appeals for the Second Circuit followed. The decision of the court was rendered

on April 25, 1962, unanimously reversing the order of the District Court and affirming and reinstating the order of the Referee directing petitioner to turn over the sum of $745,000 to the trustee in bankruptcy.

POINT I

Jurisdiction on a petition for writ of certiorari is discretionary and should be exercised sparingly and with great caution.

Application has been made to this Court by Joseph Pagano for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1254(1), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. The judgment of the Court of Appeals was entered on April 25, 1962.

Review of judgments, decrees and orders of the United States courts of appeal in proceedings under the Bankruptcy Act by this Court by writ of certiorari, is authorized by Section 24c of the Bankruptcy Act, 11 U. S. C. § 47c.

The power of determining *what* cases shall be brought up by writ of certiorari is vested solely in the Supreme Court of the United States. *Warner* v. *New Orleans*, 167 U. S. 467, 474 (1897).

The Court, on numerous occasions, has discussed in nature of the jurisdiction that is invoked herein. Thus, in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916), this Court said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance,

> or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Amer. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296."

In fact, this Court has set down some of the criteria that it will consider in granting or disallowing a writ of certiorari. In Rule 19(1) of the Revised Rules of the Supreme Court of the United States, entitled "Considerations governing review on certiorari", it is said that review by writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The primary reasons for the granting of certiorari, as indicated by the decisions of this Court and Rule 19, are conflict of decision between the various courts of appeal, need to settle an important question of federal law and conflict between the decision of the court below and the decisions of this Court.

This Court commonly has consented to act as arbiter between the various courts of appeals and to resolve any conflict of decision between the circuits. At the most recent term of this Court, certiorari was granted in numerous instances to resolve such conflict. See, *inter alia*, *St. Regis Paper Co.* v. *United States*, 368 U. S. 208 (1961); *United States* v. *Union Central Life Insurance Co.*, 368 U. S. 291 (1961); *DiBella* v. *United States*, 369 U. S. 121 (1962); *Simson* v. *Granquist*, 369 U. S. 38 (1962); and *Commissioner* v. *Bilder*, 369 U. S. 499 (1962).

Unusual or special circumstances must be present for the granting of a writ of certiorari. For instance, although there was no conflict of decision in the circuits in *Muncie Gear Works, Inc.* v. *Outboard, Marine & Manufacturing Co.*, 315 U. S. 759, 765, 766 (1942), the Court granted certiorari "in view of the questions presented and because the patent

dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decision is unlikely."

Indeed, a writ of certiorari issued to settle an alleged conflict in decision between two courts of appeals will be dismissed as improvidently granted, if a later examination of the court discerns that no such conflict existed. See *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923); *Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319, 320 (1924); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, 179 (1938); see also *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 78, 79 (1955), and cases cited in footnote 2.

In the case at bar, there is no conflict of decision between the various courts of appeals on the question presented. There is no conflict between the decision of the court below and the decisions of this Court. Nor is there presented an important question of federal law which has not been, but should be, settled by this Court.

POINT II

The decision of the courts below that the Referee had summary jurisdiction does not conflict with the decisions of this Court.

The question of whether the Referee below had summary jurisdiction to determine the merits of the trustee's claim against petitioner has been at issue throughout these proceedings. At this juncture it is raised in a somewhat different form by the petitioner as his Point III where reference is now made to "the evidence that all the directors, officers and stockholders of the corporation consented to and approved of such loan."

At the very start of the turnover proceedings the petitioner objected to the summary jurisdiction of the Bank-

ruptcy Court. In accordance with the accepted procedure, the Referee held an immediate hearing on the question of the jurisdiction of the Bankruptcy Court (12a-39a), took the testimony of the petitioner and Weinberg on that issue and rendered his decision on June 9, 1961 (56a-59a) denying the objection to the jurisdiction of the Court.

The procedure followed by the Referee was in accordance with that laid down by this Court in *Harris* v. *Chamberlin*, 271 U. S. 191 (1925). There, the Court dealt with the question of the scope of the summary jurisdiction of the Bankruptcy Court when objection has been made by an adverse claimant to property sought to be recovered summarily, and said, 271 U. S. at pages 193, 194:

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit (citations omitted). However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." (citations omitted)

This Court established the following test to determine whether an adverse claim is substantial or merely colorable (271 U. S. at p. 195):

> "* * * we are of the opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room

> for controversy,' *Board of Education* v. *Leary*, [236 Fed. 521, 527 (8th Cir. 1916)], in matters either of fact or law; and it is not to be held colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit, and a mere pretense. Compare *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 295; and *Moore* v. *New York Cotton Exchange*, 270 U. S. 593."

A more recent pronouncement by this Court dealing with the scope of the summary jurisdiction of the Bankruptcy Court and the procedure to be followed when an objection has been made to that jurisdiction is found in *Cline* v. *Kaplan*, 323 U. S. 97, 98, 99 (1944).

Thus, the bankruptcy court cannot be ousted of jurisdiction unless the adverse party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy. The adverse claim must be real and substantial and not merely colorable. The adverse claim asserted in the case at bar, when subjected to the hard scrutiny of the trial court and judged by the standards and procedures established by this Court, is nothing more than a sham attempt to oust the court from jurisdiction.

Petitioner, who looted and stuffed into his pockets $745,000 in cash from the corporate treasury of the bankrupt, comes forward with the incredible contention that the moneys to which he helped himself were merely "borrowed". He acknowledged receiving the moneys and urged in his defense, the issuance of his promissory notes evidencing the so-called loan obligation, and the making of appropriate entries in the bankrupt's books and records.

The Referee's decision on the question of summary jurisdiction and his analysis of the defenses asserted is most revealing (58a, 59a):

> "This was in my opinion the most audacious raid on a treasury that I have ever encountered. To

make sure he emptied the bank account, Pagano on each occasion of making withdrawals, took several signed checks instead of one so that he could cash as many as the bank balance would permit.

"I completely disbelieve the testimony of Mr. Weinberg as to the execution of the promissory notes. He testified that he thought he could meet the bankrupt's debts on the week-end when he expected Pagano to repay the so-called loans, but when the notes turned up it was found that they were payable three months after their date.

"I am fully convinced that Mr. Weinberg committed the grossest perjury on the witness stand. The disappearance of the books, the denial by all parties as to their whereabouts, and their sudden and fortuitous appearance on the day of this trial, with the notes neatly peeking out of the ledger, demonstrates a contemptuous trifling with this Court.

"Even if the notes were executed when Weinberg says they were, they do not make Pagano a debtor nor his claim substantial. To put it boldly, he stole the money, he stripped the bankrupt of its assets, and to stand here now and say it was a pure business transaction, and to attempt to throw a mantle of respectability on the plainest of larcenies by calling it a loan, and at the same time refusing to answer the questions on the ground his answer would tend to incriminate him, simply insults the intelligence. The claim is frivolous, baseless and fictitious and is put forward in bad faith. If ever a plain case calling for the exercise of summary jurisdiction existed, this is that case. I hold that the Court has summary jurisdiction in regard to Pagano."

The claim now made that the so-called loans to petitioner were approved by the directors, officers and stockholders of the corporation is not supported by the facts. The directors of the corporation were the petitioner Pagano, Gussie Weinberg, the wife of Joseph Weinberg (father of Stanley Weinberg) and Terry Newman, the wife of David Newman. The two men were not officers and the

only other officer of the corporation was Stanley Weinberg, who was neither a director nor stockholder. The two women together with Pagano were the sole stockholders of the corporation. There was no evidence presented below and no finding by the Referee that the wives were nominees of their respective husbands or that they had approved of the so-called loans in question. Indeed, the record would show that they did not even know of these so-called loans.

Petitioner's further claim that the loan nature of this transaction is supported by documentary evidence, consisting of promissory notes that he signed and the entries in the books of the corporation, also is not supported by the record. What purported to be promissory notes issued by petitioner to evidence his withdrawal of monies and some of the books and records turned up in the possession of Weinberg's attorney the day before the hearing of the turnover motion, after all the bankrupt's books and records had been missing for more than a month and the receiver had commenced a separate turnover proceeding for their recovery (7a, 19a, 22a, 23a, 32a, 33a).

There were such discrepancies in the notes offered in evidence as to convince any trier of fact that these pieces of paper were prepared in contemplation of such a hearing to bolster the fabricated defense to the summary jurisdiction of the court. Indeed, Judge Friendly in his opinion on behalf of the Court of Appeals below, expressly found that the term of the notes was inconsistent with Weinberg's testimony as to a short term accommodation and that their contemporaneous delivery was dubious. (Petition for Writ, page 25). As to the entries in the bankrupt's books and records, the evidence introduced before the Referee indicated that the books had been rewritten at the instructions of Weinberg to reflect the transfers to Pagano and to denominate them as loans and exchanges.

The fact is that the Referee, who observed and listened to the testimony of these illustrious businessmen, deter-

mined that both witnesses were committing perjury and ruled that the claim as to the loan nature of the transaction "was frivolous, baseless and fictitious and [was] put forward in bad faith" (59a). The Referee's decision and determination and that of the Court of Appeals below were clearly correct. The Bankruptcy Court cannot and should not be ousted of its jurisdiction by the mere assertion of a fictitious, frivolous, and baseless defense put forward in bad faith. The decision below is in complete accord with the decisions of this Court and no issue is presented of sufficient import to require the granting of the petition.

POINT III

The turnover order was properly granted with respect to petitioner and is in conformity with the decisions of this Court.

The Referee, after hearing all of the evidence and observing the witnesses, rendered a decision rejecting the fabricated defense of petitioner and entered an order directing him to turn over and surrender to the trustee the sum of $745,000, representing property of the bankrupt in his possession at the time of the entry of the order and taken by Pagano without color of right or title. Pagano, who claimed he received this money as a loan, refused to answer any questions as to present possession or disposition of this fund on the grounds that a truthful answer would tend to incriminate him.

The test for the burden of proof required of the moving party in a turnover proceeding was established by this Court in *Oriel* v. *Russell*, 278 U. S. 358 (1929):

> "We think a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence. The charge upon which the order is asked is * * * equiva-

lent to one of fraud, and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough." 278 U. S. at 362.

Judged by the standard of "clear and convincing" proof, the granting of the turnover order against petitioner was the only proper and just result that could have been reached in the proceeding. When such order is examined in the light of the landmark decision of this Court in *Maggio* v. *Zeitz*, 333 U. S. 56 (1948), which sets the standards by which all turnover orders are now to be judged, the propriety of the Referee's determination is demonstrated.

In *Maggio* v. *Zeitz, supra*, this Court examined the dual stage turnover proceeding in the light of its previous decisions and the practice that had developed.

> "The proceeding which leads to commitment consists of two separate stages which easily become out-of-joint because the defense to the second often in substance is an effort to relitigate, perhaps before another judge, the issue supposed to have been settled in the first, and because while the burden of proof rests on the trustee, frequently evidence of the facts is entirely in possession of his adversary, the bankrupt, who is advantaged by nondisclosure." 333 U. S. at page 60.

The evidence below had established that towards the end of 1941 a shortage occurred in the bankrupt's stock of merchandise, and that Maggio personally took possession of the corporation's vanishing assets. The Court pointed out that "* * * this abstraction by Maggio occurred several months before bankruptcy and over a year before a turnover order was applied for. The only evidence that the goods then were in the possession or control of Maggio was the proof of his onetime possession supplemented by a 'presumption' that in the absence of a credible explanation by Maggio of his disposition of the goods, he

continues in possession of them or their proceeds." 333 U. S. at 60.

The problem presented on certiorari was that the Second Circuit felt constrained by its previous decisions to adhere to the presumption of continued possession and affirmed the turnover order; then, in the contempt proceedings, even though convinced that Maggio in fact did not retain the goods or their proceeds up to the time of the turnover proceedings, the Court considered the turnover order *res judicata,* so that the apparent injustice could not be corrected on review of the contempt order.

This Court, per Justice Jackson, reviewed the nature and history of turnover proceedings:

> "The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity." 333 U. S. at page 61.
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> * * *
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> "* * * courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by 'clear and convincing evidence,' the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel* v. *Russell,* 278 U. S. 358; *Cooper* v. *Dasher,* 290 U. S. 106; see also *Farmers & Mechanics National Bank* v. *Wilkinson,* 266 U. S. 503." 333 U. S. at 62, 63.

The Court then turned to the burden of proof to be imposed upon the trustee seeking a turnover order and examined the so-called presumption of continued possession applied rigidly by some lower courts.

"Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one-time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

"We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement." 333 U. S. at pages 66, 67.

The balance of the opinion deals with the nature of the contempt proceedings to enforce a turnover order and the burden of proof and scope of review thereon, not here pertinent. Indeed, any issues sought to be raised by petitioner at this injuncture as to the enforcement of the turnover order are premature. The only question presented is whether the order was properly granted; the court of appeals below, in reinstating the Referee's order, determined from the whole record that the order was realistic and just.

In *Maggio* v. *Zeitz, supra*, this Court struck down the rigid application of the so-called presumption of continued possession and adopted instead a rule of reason and com-

mon sense. Numerous decisions on the Circuit Court and District Court level have followed in which the Federal courts have wrestled with the standards to be applied in accordance with the dictates of this Court in *Maggio* v. *Zeitz.*

The common theme of all cases since *Maggio* v. *Zeitz* is that there must be some showing by the trustee of present possession by the adverse party of the property sought to be recovered. The presumption of continued possession has not been discarded, but rather the courts have modified the rigidity of its application; no longer can a court close its eyes in applying this presumption. Instead all the attendant facts bearing upon the respondent's ability to comply with the order are relevant and material to the court's determination.

Wherever a turnover order has been denied, the denial has been predicated on a weakening of the presumption of continued possession by the passage of time and upon a failure of the moving party to show by "clear and convincing" proof that the respondent remains in possession of the property sought to be recovered. But in each instance the finding that the respondent no longer has possession is predicated in part upon the respondent's own testimony as to the disposition of the property sought to be recovered, or his present financial condition and means of living and all other relevant information as to his present inability to comply. See, for instance, In re *Milgrom,* 94 F. Supp. 762 (D.C.S.D.N.Y. 1950); In re *Vitemb,* 120 F. Supp. 830 (D.C.S.D. Tex. 1954).

Such is not the case at bar. Pagano himself has acknowledged receipt of $745,000.00 in cash not long prior to the hearing, but claims that these moneys were merely borrowed by him from the corporation. However, when he was questioned as to the disposition of this heaping bundle of bills, as to his present possession of the funds and as to like matters bearing upon his ability to comply with the

turnover order, he refused to answer upon the grounds that a truthful answer to the questions would tend to incriminate him. He offered no explanation whatsoever of what happened to this money. Under the circumstances, the Court had no choice but to grant the motion, possession having been shown not much more than one month prior to the institution of the turnover proceedings. Such determination was in complete conformity with the letter and spirit of this court's decision in *Maggio* v. *Zeitz*, 333 U. S. 56 (1948).

POINT IV

Inferences may be properly drawn against petitioner from his failure to testify as to facts within his control.

Petitioner urges for the first time in his Point I the absence of evidence that he has the power to comply with the turnover order or that he has present possession of all or any part of this large sum of money. He also urges as his Point II whether he had the burden to show that he no longer had possession of any part of the monies, notwithstanding his claim of a constitutional privilege against self-incriminaton.

These contentions are related. There is no question that the constitutional protection of the Fifth Amendment is available to a witness in a bankruptcy proceeding. *Counselmen* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72-73 (1920). However, the fact that Pagano may have been justified in availing himself of his constitutional privilege is no answer to the propriety of the entry of an order against him.

Whereas, under examination pursuant to Section 21a of the Bankruptcy Act by the receiver, Pagano consistently claimed his constitutional privilege with respect to

all material questions, including receipt of the monies, when it came to the hearing on the turnover motion he elected to take the stand, testify in his own behalf and offer up the frothy confection that the withdrawal of this $745,000.00 in cash was a loan to him. The bankrupt, of course, was not a money lending institution, but was engaged in the wholesale meat and poultry business. Upon cross-examination with regard to present possession of the monies and the disposition of the same—material issues, of course, to the turnover proceeding—petitioner claimed his constitutional privilege against self-incrimination.

This Court, in *Brown* v. *United States*, 356 U. S. 148 (1948), affirming 234 F. 2d 140 (6 Cir. 1956), dealt with a denaturalization proceeding, a civil cause, in which the defendant testified in her own behalf. On cross-examination she pleaded the privilege against self-incrimination as to questions as to whether she was a member of the Communist party, one of the issues of the proceeding. The Court directed her to answer and held her in contempt when she refused. The Court of Appeals for the Sixth Circuit affirmed—and so did this divided Court, per Frankfurter, J., who stated:

> "• • • • when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-

> disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States*, 347 U. S. 62, 65. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail on the balance of considerations determining the scope and limits of the privilege against self-incrimination. Petitioner, as a party to the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." 356 U. S. at pages 154-156.

In the court below, the Circuit Judge in his opinion, 234 F. 2d at page 146, commented:

> "To hold that a defendant, under the claim of protection against self-incrimination, may tell his full, self-serving story without any test of its truth by cross-examination is to make a mockery of the judicial proceeding."

The question of waiver of the constitutional privilege was presented in *United States* v. *St. Pierre*, 132 F. 2d 837 (2d Cir. 1942), a criminal proceeding to punish a witness for contempt predicated upon his refusal to answer questions before a Grand Jury. The Court, per Learned Hand, J., stated, 132 F. 2d at pages 839, 840:

> "The law in this country * * * rests upon the obvious injustice of allowing a witness, who need not have spoken at all, to decide how far he will disclose what he has chosen to tell in part, and how far he will refuse to let his veracity be tested by cross-questioning. In adversary cases, it is hard to see how a trial could go on, if this were allowed. * * * It must be conceded that the privilege is to suppress the truth, but that does not mean it is a privilege to

> garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition."

While the propriety of petitioner's claim of the Constitutional privilege was not contested below, nevertheless it can be seen that the very substantial question of a waiver may have been present, reflecting upon the justiciability at this juncture of contentions involving petitioner's claim of the Constitutional privilege. In any event, petitioner's failure to testify is most damaging to him on the issues raised by the turnover motion, which itself is not a criminal proceeding. It was no answer to the question of whether he still had the monies, or to the question of what disposition he made of the monies for petitioner to plead his Constitutional privilege. It was incumbent upon petitioner, from the evidence in his possession, to rebut the evidence contained in his own admissions of receipt of the monies.

There is a substantial body of opinion that adverse inferences may be drawn by the trier of fact in a civil proceeding from the claim of the Constitutional privilege. While Professor Wigmore in his treatise on evidence [VIII, *Wigmore, Evidence*, § 2272, p. 439 (4th Ed. McNaughton, Rev. 1961)] indicates that the cases are confused, he adds, in footnote No. 14:

> "The inference seems to be allowed with least reluctance in cases where the party claiming the privilege has an affirmative burden in the cause, where he has exclusive access to information which would, if favorable to him, dispute evidence adverse to him already before the tribunal, or where the inference is used to buttress other evidence."

There are numerous cases with respect to the inferences to be drawn from the failure of a party to a civil proceeding to rebut unfavorable evidence, either by refusal to take the stand and testify or by a claim of the constitutional priv-

ilege. For instance, in *Hansel* v. *Furnell*, 1 F. 2d 266 (6 Cir. 1924), a civil action, the defendants were charged with the commission of various criminal acts but did not take the witness stand to deny the truth of the charges. The court commented 1 F. 2d at p. 273:

> "This is a civil action, and the failure of a party to testify to facts peculiarly within his knowledge, or to call witnesses within the jurisdiction of the court to contradict evidence of conversations had with them or in their presence, is a circumstance that cannot be overlooked."

The drawing of such inferences has been approved by this Court in *Mammoth Oil Co.* v. *United States*, 275 U. S. 13 (1927) where it was stated as follows:

> "But the failure of Sinclair to testify stands on a different basis. Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge, the United States was not required to call the principal representative of the company. His silence makes strongly against the company. It is as if he personally held the lease, were defendant, and failed to testify. The guiding considerations by which the proper significance of such silence is to be ascertained were well stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster*, 5 Cush. 295,316: 'Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered—though not alone entitled to such weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of the facts and circumstances as they existed, and show, if such were the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the

proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution. While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (*Northern Railway Company v. Page*, 274 U. S. 65, 74), it justly may be inferred that he was not in a position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. (Citations omitted.)" 275 U. S. at pages 51-53.

In the case at bar the petitioner has withheld the evidence favorable to him upon his claim of the Constitutional privilege. In a civil case, the New York courts have consistently held that the trier of facts may draw an inference from the refusal of a witness to testify under claim of privilege. *Bradley* v. *O'Hare*, 2 A. D. 2d 436, 156 N. Y. S. 2d 533 (1st Dept. 1956). See, also, *Levine* v. *Bornstein*, 13 Misc. 2d 161, 174 N. Y. S. 2d 574 (Sup. Kings 1958); *Haywood* v. *Craig Colony*, 7 A. D. 2d 69, 180 N. Y. S. 2d 701, 706 (dissent) (4th Dept. 1958). Other state courts permit a trier of fact in a civil case to draw an inference from the refusal of a party to testify under a claim of Constitutional privilege. *Ikeda* v. *Curtis*, 43 Wash. 2d 449, 261 P. 2d 684, 689, 690 (1953); *Fross* v. *Wotton*, 3 Cal. 2d 384, 44 P. 2d 350, 354 (1935).

It cannot be stressed too strongly that petitioner has offered no explanation whatever with respect to the disposition of the moneys, with respect to his present possession of the same or with respect to his ability to comply with the turnover order. Faced with petitioner's recalcitrance and refusal to offer any explanation, credible or otherwise, the court below had no choice but to assume and infer that the moneys which came into his possession during the short ten day period of March 20 through March 29, 1961,

$745,000.00 in cash, continued in his possession little more than a month later at the time the turnover proceedings were commenced on May 5, 1961, and further continued in his possession until the entry of the order on July 24, 1961. Whether he still has the monies is a matter to be determined in appropriate proceedings.

Under the proof of this case, it was incumbent upon Pagano to rebut the presumption or the inference of continued possession of the $745,000 to which he helped himself, after he, himself, acknowledged receipt of the moneys. He need only have testified fully and truthfully as to what disposition he made of these moneys and as to whether or not he still had the moneys, or any part thereof, in his possession and could comply with the turnover order. Setting aside the question of waiver, he may have been justified in refusing to testify on the grounds of self-incrimination for fear of criminal prosecution but, by his very failure to testify, he failed to rebut the presumption or inference of continued possession which arises from the evidence upon which the Referee's determination was based—his own testimony of receipt of this $745,000 in cash.

There is a duty or burden imposed upon the respondent when property which is part of the bankrupt estate is traced into his hands to come forward with credible explanation of what became of it. In re *H. Magen Co.*, 10 F. 2d 91 (2d Cir. 1925); In re *Chorkin*, 249 Fed. 342 (2d Cir. 1918). A mere denial of possession is "too bald and indefinite to have any persuasive force." In re *Stavrakn*, 174 Fed. 330, 333 (2d Cir. 1909).

Petitioner declined to testify at his own risk. In *Sheinman* v. *Chalmers*, 33 F. 2d 902, 904 (3d Cir. 1929), the Court said:

> "* * * it is true the burden of proof never shifts from the party having the affirmative of an issue. There it rests, at least until he has made out a prima

facie case. Then the burden, not of proving the proponent's case but of explaining or rebutting it, shifts to the other party. This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it. (Citations omitted.)

> "What the referee plainly meant by the words 'the burden shifts' was that the trustee had proved his case against the bankrupt and that it would stand unless the bankrupt should assume the burden of explaining or contradicting it. Failing in that, the trustee's proofs would stand uncontradicted. * * *"

That petitioner declined to testify because of the possibility of self-incrimination makes no difference. In *Dittmar* v. *Michelson,* 281 Fed. 116, 117 (3d Cir. 1922), cert. den. 260 U. S. 738 (1922), the bankrupt, defending a turnover motion brought by his trustee, was asked what he had done with the cash received from certain checks and declined to answer on the ground that his answer might tend to incriminate him. He stated he lost a great deal of money, but when asked how, he again declined to answer on the grounds of self-incrimination. The Court commented (281 Fed. at 117):

> "The possession of these large sums of money and property was within so recent a period before bankruptcy as would enable an honest trader to tell what had become of them. * * * While, of course, a witness may properly decline to incriminate himself, yet the fact that crime may make it more difficult and possibly hazardous to tell what became of assets, does not destroy the presumption of continued possession of assets, whose disappearance is not accounted for."

See also *Kattelman* v. *Madden,* 88 F. 2d 858, 861 (8th Cir. 1937).

The trustee has demonstrated by clear and convincing evidence that petitioner received the money. Indeed, petitioner himself acknowledged receipt of the $745,000 in cash.

Petitioner's refusal to testify was more eloquent than any testimony the trustee could offer on the heels of Pagano's earlier acknowledgment he had received the $745,000 at issue. The Referee's order directing petitioner to return the $745,000.00 taken by him was properly granted and is in complete accord with the decisions of this Court.

The fact remains that petitioner offered no testimony or evidence whatsoever on the key issues of his disposition of this large sum of money and his present possession of the same at the time of the hearing. He did not see fit merely to plead his Constitutional privilege. He himself assumed the risk of taking the stand and offering a bald-faced fabrication, that the monies he took were borrowed by him. Once he took the stand and was pressed on cross-examination as to his present possession and as to his disposition of the monies, he then fell back upon his Constitutional privilege. Thus, it is not correct to say that there is an absence of evidence that the petitioner has the power to comply with the turnover order or that he had present possession at the time the order was granted. Such evidence as would refute the trustee's contention was completely within petitioner's control. He could have refuted this essential element of the turnover proceeding, after his own testimony placed the money in his hands, but he did not.

Upon the facts at issue no substantial question of Federal law is presented which has not been, but should be settled, by this Court. This Court has already ruled upon the propriety of drawing inferences adverse to a party from his failure to dispute, from information in his possession, evidence adverse to him and already before the tribunal. *Mammoth Oil Co.* v. *United States*, 275 U. S. 13 (1927); *Clifton* v. *United States*, 45 U. S. (4 How.) 242, 247 (1846). That petitioner claimed his Constitutional privilege instead of refusing to testify at all adds nothing to the issue sought to be reviewed in this Court. There

has been no departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision. The instant application is merely another step in petitioner's calculated defense to enforcement of the turnover order. He seeks by delay to cover his tracks and let the scent from the $745,000 grow cold.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted,

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